IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERNARD CAMPBELL	:	CIVIL ACTION
	:	
v.	:	
	:	
JENNIFER KOSLOSKY, ET AL.	:	NO. 06-3494

MEMORANDUM

Padova, J. **February 28, 2007**

Bernard Campbell, an inmate at the Ray Brook Federal Correctional Institution, has brought this pro se civil rights action pursuant to 42 U.S.C. §§ 1982, 1983, 1985(3), & 1986 stemming from alleged constitutional violations by the Department of Human Services in its oversight of his son Qadir Jones. Plaintiff also asserts a number of related state-law claims. Presently before the Court are two Motions to Dismiss filed by Defendants. For the reasons that follow, Defendants' Motions are granted.

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff, proceeding in forma pauperis, filed his Complaint on September 11, 2006, alleging that Jennifer Koslosky, a social worker for the City of Philadelphia Department of Human Services; Cheryl Ransom Garner, the Commissioner of the City of Philadelphia Department of Human Services; John Street, Mayor of the City of Philadelphia; and Edward G. Rendell, Governor of Pennsylvania, violated 42 U.S.C. §§ 1982, 1983, 1985(3) & 1986 (collectively, "the First Cause of Action"), and various state laws ("the Second Cause of Action"). On November 1, 2006, Defendant Rendell filed a Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). On December 12, 2006, Defendants Koslosky, Ransom Garner, and Street (the "City Defendants") filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6). Plaintiff

has filed separate responses to these Motions.

The following facts are alleged in the Complaint and are relevant to the disposition of the two pending Motions. In 1993, the Department of Human Services ("DHS") became aware that Plaintiff's son Qadir was suffering from child abuse and neglect, and that he was being exposed to substance abuse while living with his biological mother and step-father. DHS was also aware that Qadir suffered from mental illness. At that time, Plaintiff made numerous requests to DHS seeking custody of Qadir. He alleges that, beginning in 1993, DHS failed to act upon the information provided to it regarding Qadir's situation and, as a result of DHS's failure to carry out its professional duties, Qadir's situation has worsened. On May 25, 2006, DHS notified Plaintiff that Qadir's current situation is now classified as "Suicidal and Dangerous." According to Plaintiff, DHS withheld information about Qadir's condition. Plaintiff alleges that Defendants and the City of Philadelphia failed to adequately train, supervise, and discipline the employees of DHS. Plaintiff further asserts that he is suffering from severe mental anguish, psychological wounds, and mental trauma as a result of learning of Qadir's current situation.

II. LEGAL STANDARD

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff. Id. A pro se complaint is "held 'to less stringent standards than formal pleadings drafted by lawyers'," Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1979)), and "should not be dismissed for failure to state a claim unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 10 (citing Haines, 404 U.S. at 520-21).

III. DISCUSSION

A. Claim Pursuant to 42 U.S.C. § 1983

Plaintiff alleges a cause of action pursuant to § 1983. Defendants move to dismiss the Complaint for failure to state a claim upon which relief can be granted. Defendant Rendell argues that Plaintiff cannot state a § 1983 claim because DHS played no part in the creation of the harm suffered by Qadir, and the Due Process Clause does not impose upon any government entity an affirmative duty to provide Plaintiff's son with adequate oversight or protection. The City Defendants similarly argue that Plaintiff cannot state a § 1983 claim because he has failed to allege a violation of any constitutionally protected right. Plaintiff replies that he has alleged a valid constitutional claim to address the injuries he has suffered as a result of the injuries to his son, and that he has a due process interest in the custody and well-being of his son. Based on the following analysis, we conclude that Plaintiff cannot show that any action on the part of Defendants deprived him of a right secured by the Constitution or the laws of the United States. Consequently, his claims brought pursuant to § 1983 are dismissed pursuant to Rule 12(b)(6).

Section 1983 provides remedies for deprivations of rights established in the Constitution or federal laws, it does not create substantive rights. Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979). To state a cause of action pursuant to § 1983, a plaintiff must demonstrate that the defendant, acting under color of law, deprived him or her of a right secured by the Constitution or the laws of the United States. Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999). The first step in evaluating a § 1983 claim is to "'identify the exact contours of the underlying right said to have been

violated' and to determine 'whether the plaintiff has alleged a deprivation of a constitutional right at all.'" Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000) (quoting County of Sacramento v. Lewis, 523 U.S. 833 n.5 (1998)).

In his Complaint, Plaintiff claims that Defendants violated the First, Fifth, Sixth, Seventh, Eighth, Eleventh, and Fourteenth Amendments. The Complaint does not clearly state how the conduct by Defendants violated the rights protected by these amendments. However, based on a fair reading of the Complaint and Plaintiff'sResponses to the Motions to Dismiss, we interpret the Complaint to allege that Defendants, acting under color of law, violated Plaintiff's substantive due process rights protected by the Fourteenth Amendment. This claim appears to be premised on his parental liberty interest in the care, custody, and companionship of his minor child, which he alleges Defendants violated by their (1) unlawful conduct toward his minor child and (2) failure to inform him of the condition of his child over a period of 12 years.[1] A brief discussion of the parental liberty interest is required before addressing whether Plaintiff has properly alleged of deprivation of this constitutional right.

The Supreme Court has observed that the liberty interest of parents in the care, custody and control of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000). In Troxel, the Court held that a Washington state statute that permitted "any person" to petition a court for visitation rights "at any time," when such visitation would "serve the best interest of the child" was unconstitutional as applied because it violated the parents' substantive due process rights. Id. at 60. The Court explained that the liberty

[1]Plaintiff does not state, and we cannot discern from reading the Complaint, a basis for his allegations that Defendants violated his First, Fifth, Sixth, Seventh, Eighth, and Eleventh Amendment rights. Accordingly, we grant the Motions to Dismiss regarding these claims.

interest at issue was premised on the right of parents to "make decisions" concerning the rearing of their children. Id. at 66.

The United States Court of Appeals for the Third Circuit also recognized that there is a parental liberty interest protected by the Due Process Clause. In Estate of Bailey by Oare v. York County, 768 F.2d 503 (3d Cir. 1985), overruled in part by DeShaney v. Winnebago County Dep't. of Social Servs., 489 U.S. 189, 201 (1989), the biological father of a five-year old girl, who died from injuries inflicted on her by her mother and her mother's paramour, brought a § 1983 lawsuit against the York County Children and Youth Services. Id. at 505. The agency had returned the child to the custody of her mother a month before the child's death even though it knew that she had been physically abused while in her mother's care. Id. Bailey held that a parent has a "cognizable liberty interest in preserving the life and physical safety of his [or her] child from deprivations caused by state action, a right that logically extends from [the parent's] recognized liberty interest in the custody of his [or her] children and the maintenance and integrity of the family." Id. at 509 n.7 (citing cases). Bailey further held that "a parent whose child has died as a result of unlawful state action may maintain an action under § 1983 for the deprivation of liberty." Id. (citing Bell v. City of Milwaukee, 746 F.2d 1205, 1242-45, 1261-53 (7th Cir. 1984).

In McCurdy v. Dodd, 352 F.3d 820 (3d Cir. 2003), the Third Circuit refined the scope of the parental liberty interest relied upon by the Supreme Court in Troxel and the Third Circuit in Bailey. McCurdy involved a § 1983 claim brought by a parent alleging that he had a liberty interest protected by the Due Process Clause in the companionship of his son who was shot and killed by the police. McCurdy recognized that, "in § 1983 cases grounded on alleged parental liberty interests," the court was "venturing into the murky area of unenumerated constitutional rights." Id. at 825 (citing Troxel,

530 U.S. at 92 (Scalia, J., dissenting)). Furthermore, because liberty interests and fundamental rights are "amorphous and indistinct," the court noted that the Third Circuit has cautioned courts to pay "'scrupulous attention to the previously established guideposts.'" McCurdy, 352 F.3d at 826 (quoting Boyanoski v. Capital Area Intermediate Unit, 215 F.3d 396, 400 (3d Cir. 2000)). McCurdy reiterated that parents have a liberty interest in preserving the life and physical safety of their children, id. at 827 (quoting Bailey, 768 F.2d at 509 n.7), however, it concluded that the defendants were entitled to summary judgment for two reasons. Id. at 829-30. First, the parental liberty interest articulated by the relevant case law concerned the relationship between parents and their minor children. Id. at 828 (citing Troxel, 530 U.S. at 66). In McCurdy, the plaintiff's son injured by the allegedly unlawful state action was an adult, and the court refused to extend the parental liberty interest to include relationships with adult children. Id. at 829. Second, the court stated that it was "hesitant to extend the Due Process Clause to cover official actions that were not deliberately directed at the parent-child relationship . . . ." Id. McCurdy held that the police officer's actions in the shooting death of the plaintiff's son were directed at the son alone, and "were not directed at the relationships between the parents and their son in the same way that the official actions in Troxel and Bailey were." Id. at 830. According to McCurdy, the Due Process Clause protects against deliberate violations of a parent's fundamental rights, and does not protect against government actions that affect the parental relationship only incidentally, as in situations where a police officer kills a child. Id. at 830.

With this framework in mind, we can now address Plaintiff's claims of deprivation of his parental liberty interests.

1. Loss of companionship

Plaintiff asserts a claim on his own behalf that, as a parent, he has a liberty interest in the

companionship of his son, and that he was deprived of this interest by Defendants' unlawful conduct toward his son. Summarizing the above discussion, Bailey informs us that a parent may maintain a § 1983 action for loss of companionship when a child has suffered an injury as a result of unlawful state action, and McCurdy limits this ability by requiring thatthe alleged unlawful state action be directed toward the parent-child relationship and that the child be a minor. Thus, for parents to state a valid § 1983 claim for loss of companionship of a child, they must allege: (1) that the child is a minor, (2) that the unlawful conduct was directed toward the parent-child relationship, and (3) that the injury they suffered is the result of unlawful state action against their child, . See Bailey, 768 F.2d at 509 n.7; McCurdy, 352 F.3d at 829-30. In the instant case, Plaintiff's son is alleged to be a minor as his date of birth is September 3, 1991. Additionally, the alleged misconduct by Defendants was directed toward the parent-child relationship, like the alleged misconduct in Bailey, because it concerned the care, custody, and control of the child. Therefore, the requirement that a claim for deprivation of parental liberty interest be based on misconduct that is not incidental to the parent-child relationship is satisfied. However, we conclude that Plaintiff cannot show that his son's injury was the result of unlawful state action. Consequently, this allegation of a deprivation of parental liberty interest fails to state a claim upon which relief may be granted.

Based on a fair reading of the Complaint, Plaintiff asserts that his son's due process rights were violated by Defendants when they failed to take action to protect him from abuse, neglect, and exposure to drug abuse. However, Plaintiff's son cannot maintain a direct action for his alleged injuries because the Due Process Clause imposes no affirmative duty to protect a citizen, not in state custody, from injuries caused by private parties, and the exceptions to this general rule are not applicable based on the facts of this case. See DeShaney, 489 U.S. at 201; Morse v. Lower Merion

Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997). In DeShaney, a four-year old boy was severely beaten by his natural father. Id. at 191. The boy and his mother brought a § 1983 action against the social workers and local officials who had received complaints that the boy was being abused by his father, which they had reason to believe were true, but nonetheless did not act to remove the boy from the father's custody. Id. DeShaney held that the Due Process Clause was not applicable in situations where the harm suffered was the result of misconduct by a private party, and the state played no part in their creation and did not render the victim any more vulnerable to them. Id. at 201. DeShaney also specifically rejected the argument that there was a "special relationship" between the boy and the defendants, even though they may have been aware of the dangers he faced and, at one point, they had taken the boy into temporary custody. Id.

Following DeShaney, Courts have recognized two exceptions to the general rule that the state has no affirmative obligation to protect people from injuries caused by private individuals: the "special relationship" exception and the "state-created danger" exception. Morse, 132 F.3d at 907. The "special relationship" exception, which was found to be inapplicable to the facts in DeShaney, allows a plaintiff to recover "when the state enters into a special relationship with a particular citizen . . . [and] fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty." D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc), cert denied, 506 U.S. 1079 (1993). The Supreme Court explained that a "special relationship" exists when a person is incarcerated, institutionalized, or subject to some other similar restraint of personal liberty. DeShaney, 489 U.S. at 200.

The state-create danger exception is derived from language in DeShaney, and was adopted by the Third Circuit in Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). Third Circuit case law

establishes a four-part test for a state-created danger claim:

> (1) the harm ultimately caused was foreseeable and fairly direct;
> (2) a state actor acted with a degree of culpability that shocks the conscience;
> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's action, as opposed to a member of the public in general;
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006) (citations and internal quotations omitted). The Third Circuit has also explained that, under the fourth part of the test, "'liability under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger.'" Id. at 282 (quoting D.R., 972 F.2d at 1374) (emphasis in Bright). Where the only affirmative exercise of state authority places plaintiffs in no worse a position than that in which they would have been had the state not acted at all, there is no violation of the Due Process Clause. Id. at 285 (citing DeShaney, 489 U.S. at 201). The Third Circuit further notes that "it is misuse of state authority, rather than failure to use it, than can violate the Due Process Clause." Id.

In the instant case, any injury to Plaintiff's son was caused by third parties, in this case his biological mother and step-father. The Due Process Clause does not protect individuals from harm caused by third parties unless there is a "special relationship" between the state and the injured individual, or the "state-created danger" exception is applicable. There are no allegations in the Complaint that Qadir was in the custody of DHS when he was injured, thus there was no "special relationship" between him and Defendants. Furthermore, the state-created danger exception is inapplicable because, as in DeShaney, there are no allegations that an affirmative use of state

authority led to Qadir's injury. Rather, the allegations in the Complaint assert, at most, that DHS failed to use its authority. For example, the Complaint asserts that Plaintiff made requests for custody of his son, and that Defendants "failed to carry out and execute their required professional responsibilities." (Compl. ¶ 15-16.)

As Plaintiff cannot show that the injury to his son was the result of unlawful state action, Plaintiff's claim for loss of companionship fails to state a claim upon which relief may be granted.

2. Failure to notify

Plaintiff also alleges a § 1983 due process claim based upon Defendants' failure to notify him of Qadir's condition during the 12 year period between 1994 and 2006. While Plaintiff does have a parental liberty interest that extends to the companionship of a minor child and the right to make critical child-rearing decisions concerning the care, custody, and control of minor children, we find no authority, nor have the parties cited any, that stands for the proposition that the Department of Human Services, or any similarly situated government agency, has a constitutionally mandated affirmative duty to provide information regarding a child, not in state-custody, to a parent such as the Plaintiff in this case. Because this alleged conduct by Defendants does not implicate any of Plaintiff's constitutional rights, Plaintiff cannot state a § 1983 claim based on this state action. Therefore, Plaintiff's § 1983 claim based on Defendants' failure to notify him is dismissed.

B. Claims Pursuant to 42 U.S.C. §§ 1982, 1985(3) and 1986

Although Plaintiff asserts a federal cause of action pursuant to 42 U.S.C. §§ 1982, 1983, 1985(3), and 1986, Defendant Rendell and the City Defendants understand the Complaint to primarily allege violations of § 1983, and therefore, direct their motions to dismiss against Plaintiff's § 1983 cause of action. However, in addition to failing to state a claim pursuant to § 1983, we conclude that

Plaintiff fails to state a claim upon which relief can be granted pursuant to §§ 1982, 1985(3), and 1986. Consequently, the claims asserted in the Complaint pursuant to these sections are dismissed.[2]

Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982. The elements of a claim under § 1982 are (1) defendant's racial animus; (2) intentional discrimination; and (3) deprivation of plaintiff's property right based upon race. Lemon v. MTS, Inc., Civ. A. No. 2730, 2001 U.S. Dist. LEXIS 11013, at *5 (E.D. Pa., June 29, 2001) (citing Brown v. Philip Morris, Inc., 250 F.3d 789 (3d Cir. 2001)). The Complaint contains no allegation of a deprivation of Plaintiff's property right based upon race, and therefore, fails to state a claim upon which relief may be granted pursuant to this statute. Consequently, as far as Plaintiff's Complaint alleges a cause of action pursuant to § 1982, the Complaint is dismissed.

Section 1985(3) provides a private right of action for an individual who has been injured by a conspiracy of two or more persons to deprive him, or a class of persons, of "the equal protection of the laws, or of equal privileges and immunities under the laws . . . ." 42 U.S.C. § 1985(3). To state a claim pursuant to § 1985(3), a plaintiff must plead the following elements: (1) a conspiracy; (2) for the purpose of depriving any person or class of person of equal protection of the laws or equal privileges and immunities; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

[2]Although Defendant Rendell's Motion to Dismiss does not address these claims at all, and the City Defendants address them only indirectly, pursuant to 28 U.S.C. § 1915(e)(2)(B), a district court shall dismiss a case that is proceeding in forma pauperis, at any time, if the court determines that the action is frivolous. A complaint is frivolous if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989).

United Bhd. of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 829 (1983); Barnes Found. v. Township of Lower Merion, 242 F.3d 151, 162 (3d Cir. 2001). To satisfy the second element, a plaintiff must allege that the defendants were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus. . . ." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). In the instant action, the Complaint does not allege that any of the Defendants were motivated by racial or other class-based invidiously discriminatory animus. Accordingly, as far as the Complaint alleges a cause of action pursuant to § 1985(3), the Complaint is dismissed.

Section 1986 provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented. . . .

42 U.S.C § 1986. Plaintiff's claim under § 1986 necessarily fails in the absence of a § 1985 violation. See Rogin v. Bensalem Twp., 616 F.2d 680, 696 (3d Cir. 1980) ("Because transgressions of § 1986 by definition depend on a preexisting violation of § 1985, if the claimant does not set forth a cause of action under the latter, its claim under the former necessarily must fail also.").

C. Supplemental State Law Claims

Because we have granted Defendants' Motions to Dismiss with regard to all of Plaintiff's federal claims, we decline to exercise supplemental jurisdiction over his state law claims, pursuant to 28 U.S.C. § 1367(c)(3). See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir.1990) ("[T]he rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court.") Accordingly, Plaintiff's state law claims are dismissed without prejudice so that he may refile them in state court.

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ORDER

AND NOW, this 28th day of February, 2007, upon consideration of Defendant Rendell's Motion to Dismiss (Doc. Entry # 12); the Motion to Dismiss filed by Jennifer Koslosky, Cheryl Ransom Garner, and John Street (Doc. Entry # 17); Plaintiff's "Motion in Opposition to Defendant's Motion to Dismiss Complaint for Failure to State a Claim" (Doc. Entry # 21); and all other papers filed in connection therewith, **IT IS HEREBY ORDERED** that Defendants' Motions to Dismiss are **GRANTED** as follows:

1. Plaintiff's First Cause of Action is **DISMISSED WITH PREJUDICE**.

2. Plaintiff's Second Cause of Action is **DISMISSED WITHOUT PREJUDICE** to being refiled in state court.

3. The Clerk of Court is **DIRECTED** to mark this case **CLOSED**.

BY THE COURT:

s/ John R. Padova, J.
John R. Padova, J.